IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, U.A.W.A., A.F. of L. LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMAN, HERBERT JACOBSEN,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGERALD, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

BRIEF OF BRIGGS & STRATTON CORPORATION IN REPLY TO AMICUS BRIEF FOR NATIONAL LABOR RELATIONS BOARD

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The Board's Argument Proceeds on an Erroneous Assumption and Has Been Correctly Decided Aganst It.

We hesitate to burden the Court with still another brief, but feel it necessary to make a very short reply to the brief filed for the National Labor Relations Board so that failure to do so may not leave any implication that the brief is not answerable. On the contrary, its argument has been fully met and answered by this Court in its decision herein, due to the fact that the whole thesis of the Board's present brief constituted one of the princi-

pal arguments of the petitioners, which they covered at great length in their original brief. The Board has merely and at great length repeated, in varying language, the points so exhaustively covered and argued before this Court in the voluminous briefs heretofore filed and in the lengthy oral argument.

Every case of any consequence cited in the Board's brief (and many more not there cited) were brought to the attention of this Court in one or the other of the twelve briefs originally filed herein. Furthermore, since those briefs were filed, this Court has decided at least four other cases applying the principles of the decision in this case,—the three "Closed Shop" cases and the *Algoma Plywood* case.

The Board is unnecessarily exercised over what it conceives to be the extent of the holding in this case,—even carrying its argument to the untenable extreme of indicating (pp. 53-5) that States could, under this decision, prohibit all strikes, whereas no fair reading of the decision leads to any such conclusion.

The Board, in substance, says *it believes* that Congress intended to commit to the Board, to the absolute exclusion of any state regulation whatever, every conceivable phase of labor relations affecting commerce, including all employer, union and employee conduct connected in any way with "labor relations," short of actual violence, fraud and "similar conduct".

Since the Board starts with that premise which this Court in a series of cases, including the decision herein, has demonstrated to be erroneous, the bulk of the Board's argument falls. Although the Board's argument is broken up into a number of headings and subheadings, each sec-

tion is a reiteration in different language of what the Board believes was the intent of Congress. That "belief", which it attempts largely to spell out of legislative history and debate (from which a contrary conclusion has been reached by this Court from the same source material), necessarily must give way in the face of (1) the actual language of the Act itself, and (2) the judicial construction of the Act repeatedly given to it by this Court and lower Federal Courts in applying basic principles for ascertaining Congressional intent in connection with legislation impinging on state's activities.

The brief, furthermore, is not only inconsistent with one of the principal conclusions of the petitioners, but is inconsistent within itself. The petitioners asserted vigorously and in purported reliance on legislative history that the activity in question is positively protected by the Federal Act. The brief of the Congress of Industrial Organizations filed amicus curiae herein asserts with equal confidence from similar sources that the tactics would be an unfair labor practice not protected under the Federal Act. Finally, the Board now argues that it might or might not be an unfair practice, and that "The question is an open one" (Br. p. 29), whereas at several other points in the brief the Board indicates that it has already prejudged the situation and that the activities are protected under the Act (Br. pp. 45, 46, 57, 58).

The striking feature of the Board's brief is its complete failure to recognize what this Court clearly envisioned; namely the underlying implications of these tactics, and that if they are uncontrolled by state regulation (since they are not specifically regulated by Federal legislation), the logical result is Union control of the hours and conditions of employment.

The Board falls into the same inconsistent position as the petitioners in arguing at one point that Congress left the control of these activities to retaliation or discharge by the employer, while arguing at a later place that the only way the matter could get to the Board would be by the employer, at his peril, inflicting discharge or discipline and then running his chances of being told later by the Board whether or not he acted within his rights.

The temptation is strong to point out in more detail, section by section, the specific fallacies and occasional inconsistencies of the Board's brief, but we feel that at this late stage of the case it would be little short of an imposition on the time and patience of the Court, if not a reflection on its understanding of the issues which were before it, for us to make such an argument, particularly having in mind that our last brief (pp. 11-21) and that of the Wisconsin Attorney General filed in Response to the Petition for Rehearing have covered the point, but primarily because this Court's own decision is the best possible refutation to the argument again repeated by the Board.

While it has no particular bearing on the outcome of the case, we do call attention to the fact that footnote 6 at page 47 is not only inaccurate but leaves a wholly erroneous impression, which we believe the Solicitor General and the other attorneys whose names appear on the brief could not have intended, and which may have been due to inaccurate information furnished them. The footnote says the Union has filed charges alleging that the Company violated the Act "by imposing disciplinary penalties upon employees for engaging in a series of work stoppages similar to those considered by the Court in this case". Actually, the formal charge filed by the Union and of record, at least in the Chicago Regional Office of

the Board, asserts that the Company has engaged in unfair labor practices in that, among other things, it "has discriminated in regard to terms or conditions of employment in threatening to withdraw holiday compensation and threatening to shut down its plants because of the exercise of rights guaranteed to the employees under the Act". An affidavit of a representative of the Union filed with the Board in support of the charge simply states "That as a result of the unfair labor practices on the part of the employer, the Union engaged in a strike on April 28, 1948; that following the return of the employees to work, the company publicly announced that as a result of such strike the members of the Union would forfeit pay which they would otherwise receive for the Memorial Day holiday; that an official of the company has stated that should the employees again strike, they will be shut out of the plant in retaliation for such strike". There is no reference whatever to any "series of work stoppages" and, of course, the charges are merely unproven *claims* of the Union.

The next sentence of the footnote to the effect that "These stoppages occurred after the Circuit Court of Milwaukee County set aside the order of the Wisconsin Board" is stated as a fact and also leaves an erroneous impression inasmuch as April 28, 1948, the only date referred to by the Union in its charges or affidavit, was months after the order of the Wisconsin Board had been *reinstated* by the decision of the Wisconsin Supreme Court.

The last sentence is also completely inaccurate in that the Board is, in fact, actively investigating the charges, as evidenced by a telephone call for data received by this Respondent's counsel from a Field Representative of the Chicago Office of the Board as late as April 11, 1949.

It is not amiss to note in conclusion that this decision was announced nearly two months ago; that Congress is presently in session and considering revision of the Federal labor laws; that in view of the several conflicting opinions among the Petitioners here, the C. I. O. Union, the National Board, the Respondents and this Court as to what the Congressional intent was, the present Congress is in a position to clarify at least what its intent is, if there is any genuine doubt about it or if it does not accord with the present intent of the present Congress.

For the reasons set out in this and the other briefs which we and the Attorney General of Wisconsin have recently filed, and for the reasons contained in the decision of the Court in this case, it is respectfully submitted that the petition for rehearing should be denied.

Respectfully submitted,

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